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No. 237

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

EDYTH LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on April 13, 1940, affirming the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 18–29) is reported in 39 B. T. A. 1134. The opinion of the Circuit Court of Appeals (R. 72–74) is reported in 110 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 13, 1940 (R. 74). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent at 80 years of age was uninsurable. However, in conjunction with her purchase of an annuity, there was issued to her a so-called single premium life insurance policy. The effect of the combined annuity and insurance policies was to eliminate the risk inherent in life insurance.

The question presented is whether, in view of the absence of risk, the proceeds of the so-called insurance policy constituted an amount receivable "as insurance" within the meaning of Section 302 (g) of the Revenue Act of 1926, thereby enabling the decedent's estate to claim the special $40,000 estate tax exemption applicable to insurance.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra,* pp. 7–14.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 19–28), may be summarized as follows:

Cecile Le Gierse, a resident of New York, died of paralysis or cerebral apoplexy on January 1,

1936, at 80 years of age. She had suffered from chronic arthritis for eight or ten years but her condition had never reached an "acute" stage. (R. 19–20.)

On December 6, 1935, less than one month prior to her death, decedent entered into two "contracts" with the Connecticut General Life Insurance Company of Hartford, Connecticut. One was an annuity contract in standard form, and the other was a so-called "Single Premium Life Policy—Non Participating" also in standard form, containing the usual provisions for cash surrender, optional modes of settlement at maturity, etc. (R. 20–24.) *The insurance company would not have issued the insurance policy without the annuity* (R. 25–26). No physical examination was taken by the decedent, nor did she answer in her application for insurance the additional questions to be answered when the applicant is a woman (R. 24–25).

A regular form for proof of death was submitted and upon receipt thereof the proceeds of the life insurance in the amount of $25,000 were available to the beneficiary, Edyth Le Gierse. However, upon proof of death the company was requested by the beneficiary to retain the proceeds under one of the additional modes of settlement included in the life insurance policy issued (R. 25).

The company treated the two contracts as separate and issued a separate receipt to the decedent as to each, for the amount above referred to. The

company maintains separate reserves for insurance and annuities. The $22,946 premium paid for the life insurance policy was credited to the insurance account and the $4,179 paid for the annuity was credited to the annuity account. The company is required to report, to the state commissioner of insurance, insurance policies issued and canceled, also annuities issued and canceled, and the two contracts were reported under the two groups, one under life insurance and one under annuities. In computing the single premium paid for the life insurance policy, no adjustment was made for the amount to be received as a premium for the annuity policy. Likewise, in computing the amount charged for the annuity policy, no adjustment was made for the single premium to be received on the insurance policy. (R. 25.)

The Commissioner determined that both policies were purchased as one transaction and as such the proceeds were not receivable as "life insurance," but that the entire transaction represented a transfer made to take effect at or after death in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926, as amended. (R. 27–28.) The Board of Tax Appeals reversed this determination, holding that the proceeds of the policies qualified as an amount receivable "as insurance" within Section 302 (g) with the consequence that such proceeds would be exempt since they aggregated less than $40,000. (R. 29.) The Circuit

Court of Appeals, although conceding that "the entire transaction is to be considered", nevertheless affirmed the decision of the Board. (R. 73-74.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the so-called single-premium life insurance policy, issued in conjunction with the life annuity contract, is a life insurance policy within the purview of Section 302 (g) of the taxing statute, as amended.

2. In holding and deciding that the so-called life insurance policy, issued in conjunction with the life annuity contract, could be given effect as a life insurance policy within the purview of the statute although it would not have been issued as a separate and independent contract.

3. In not holding and deciding that the disposition made by the decedent of the proceeds arising out of the so-called life insurance policy constituted a transfer in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, within the purview of Section 302 (c).

4. In not holding that the so-called insurance policy or proceeds therefrom were includable in the decedent's gross estate under Section 302 (a) or Section 302 (d).

5. In not holding that the so-called life insurance policy was not an insurance policy upon the

life of the decedent within the meaning of the statute.

6. In not reversing the decision of the Board of Tax Appeals and affirming the determination of the Commissioner of Internal Revenue.

7. In holding there was no deficiency in tax under the facts as adduced.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is squarely in conflict with two other recent decisions in the Circuit Courts of Appeals. *Commissioner* v. *Tyler* (C. C. A. 8th), decided April 29, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, Par. 9439, and *Commissioner* v. *Keller* (C. C. A. 3d), decided May 28, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, Par. 9494.

2. This case presents an important question in the administration of the federal estate tax laws. We are advised by the Treasury Department that there are between 300 and 400 like cases pending in the Bureau of Internal Revenue involving substantial amounts of revenue.

CONCLUSION

In view of the conflict of decisions and the general importance of the question presented, it is respectfully submitted that this petition should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 401 and 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money

or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

(d)(1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 80 (1937 Ed.):

ART. 13. PROPERTY OF DECEDENT AT TIME OF DEATH.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of

his death, except real property situated outside the United States.

* * * * * *

ART. 18. TRANSFERS WITH POSSESSION OR ENJOYMENT RETAINED.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate. (See article 15).

If for any such period the use, possession, rents, or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents, or other income will be treated as having been reserved to or retained by the decedent.

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of

this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

ART. 19. TRANSFERS WITH RIGHT RETAINED TO DESIGNATE WHO SHALL POSSESS OR ENJOY.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent reserved or retained, either to himself alone or in conjunction with any other person or persons, the right during his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence an intention that the right should continue for at least the duration of his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15).

(b) *Taxability.*—If the transfer was not a bona fide sale for an adequate and full consideration in money or money's worth, the property or the interest or interests therein so transferred shall be included in the gross estate if falling within any one of the following paragraphs:

* * * * *

(3) When the transfer was made and decedent died after the enactment of the Revenue Act of 1932 (5 p. m. eastern standard time, June 6, 1932) and the right to so designate was reserved at the time of the transfer, whether exercisable by decedent alone or in conjunction with a person or persons having

or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this article, the expression "reserved at the time of the transfer" includes any understanding, expressed or implied, had in connection with the making of the transfer that the right to designate the person or persons who should possess or enjoy the property or the income therefrom should later be created or conferred.

ART. 20. TRANSFERS WITH POWER TO CHANGE THE ENJOYMENT—(a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

* * * * *

(b) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction

with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * *

As used in this and in the next succeeding article, the expression "reserved at the time of the transfer" refers to a power which, having been reserved when the transfer was made, continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in con-

nection with the making of the transfer that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or through the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3)).

* * * * *

ART. 25. TAXABLE INSURANCE.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to have been taken out by the decedent, whether or not he made the

application, if he acquired the ownership of, or any legal incident thereof in, the policy; but in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulations 80), the provisions of the second paragraph of article 25 of Regulation 70 (1929 edition) will continue to apply. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

ART. 27. INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in the appropriate schedule of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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